

Hon. Fred Van Sickle

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**IN THE UNITED STATES DISTRICT COURT
 FOR THE EASTERN DISTRICT OF WASHINGTON
 AT RICHLAND**

13 James S. Gordon, Jr.,
 14 Plaintiff,
 15 v.
 16 Impulse Marketing Group, Inc.,
 17 Jeffrey Goldstein, Phillip Huston,
 18 and Kenneth Adamson,
 19 Defendants.

Case No.: CV-04-5125-FVS

DEFENDANTS' MEMORANDUM
 IN SUPPORT OF THEIR MOTION
 TO DISMISS THE SECOND
 AMENDED FIRST AMENDED
 COMPLAINT

20 Impulse Marketing Group, Inc.,
 21 Third-Party Plaintiff,
 22 v.
 23 Bonnie F. Gordon, Jamila Gordon,
 24 James Gordon, III, and Jonathan
 25 Gordon,
 26 Third-Party Defendants.

DEFENDANTS' MEMORANDUM IN SUPPORT OF
 THEIR MOTION TO DISMISS PLAINTIFFS' 2ND AMENDED
 FIRST AMENDED COMPLAINT - 1
 00085432;1

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I. PRELIMINARY STATEMENT

Defendants Impulse Marketing Group, Inc. (“Impulse”), Jeffrey Goldstein (“Goldstein”), Phillip Huston (“Huston”) and Kenneth Adamson (“Adamson”) (collectively, “Defendants”) hereby submit this memorandum in support of their motion to dismiss Plaintiff’s Second Amended First Amended Complaint (the “2nd AFAC”) pursuant to Fed. R. Civ. P. 1(b)(1), (2) and (6) and Fed. R. Civ. P. 41(b).

II. INTRODUCTION

A. Procedural History

Gordon is a professional plaintiff, with no less than eleven similar cases pending in United States District Courts in the State of Washington. (Wolery Decl. ¶ 18.) Even Plaintiff himself admitted on his website (gordonworks.com) that he has “developed a system that shifts the ‘financial’ burden from [himself] back to those who choose to send [him] spam.”¹ In fact, Plaintiff previously admitted in his response to Defendants Impulse, Goldstein and Adamson’s motion to dismiss the Amended Complaint that Plaintiff’s discovery production was intended to “induc[e] IMG to settle.”² Plaintiffs are testing their luck at making their “spam business” extraordinarily lucrative by seeking statutory damages through a strategy of spam collection and serial litigation. Plaintiff’s scheme becomes apparent when evaluating the case at bar.

Nearly three (3) years and five hundred thirty (530) docket entries ago, Plaintiff commenced this action by the filing of a summons and complaint on November 23, 2004 against Impulse (the “Original Complaint”). (Wolery Decl. ¶ 2.) Since that time, Plaintiff and Siegel have demonstrated a pattern of misconduct and disregard for orders of this Court and the Federal Rules of Civil Procedure.

¹(Moynihan Decl. Supp. Huston’s Mot. Dismiss ¶ 18; Ex. C.)

²(Pl.’s Resp. Opp’n Impulse, Goldsetin & Adamson Mot. Dismiss at 17.)

1 More than one and a half years later, on June 13, 2006, Plaintiff filed his First
2 Amended Complaint (the "FAC"), naming three (3) new defendants and adding new
3 causes of action.³ (Wolery Decl. ¶3.) Both the Original Complaint and the FAC were,
4 *inter alia*, rife with vague, ambiguous and often conclusory allegations that Impulse (and
5 subsequently, Defendants) had violated "at least one" prohibition of RCW § 19.190, *et*
6 *seq.* (collectively referred to as "CEMA"). (Wolery Decl. ¶ 4.) Defendants
7 subsequently moved to dismiss the FAC or, in the alternative to require a more definite
8 statement.⁴

9 In response to Defendants' motion to dismiss, Plaintiff unilaterally and in direct
10 contravention of Fed. R. Civ. P. 15, filed an unauthorized Second Amended Complaint
11 (the "SAC") on September 11, 2006. (Wolery Decl. ¶ 6.) On September 13, 2006,
12 Defendants filed an objection to the unauthorized pleading and rejected the SAC.
13 (Wolery Decl. ¶ 7.) In an attempt to remedy his willful violation of Fed. R. Civ. P. 15,
14 Plaintiff moved to amend his complaint on October 10, 2006. (Wolery Decl. ¶ 8.)
15 Seeking relief from Plaintiff's repeated violations of the Federal Rules of Civil
16 Procedure and orders of the Court, on or about November 8, 2006, Defendants
17 moved this Court for sanctions against Plaintiff. (Wolery Decl. ¶ 9.)

18 On May 10, 2007, the Court granted in part and denied in part Plaintiff's motion
19 to amend, permitting Plaintiff only to amend Section 4.3 of the FAC to include
20 paragraphs 4.3.3, 4.3.4 and 4.3.5 to allege damages under the Prize Statute. (May 10,

21 ³Despite the Court's specific order denying Plaintiff's request to add new plaintiffs, Plaintiff
22 surreptitiously added the d/b/a "Gordonworks.com" as a plaintiff in the action. (Wolery Decl. ¶ 3.)

24 ⁴Defendants Impulse, Goldstein and Adamson moved to dismiss the FAC on or about
25 August 31, 2006. Defendant Huston was not served with the FAC until November 2, 2006, and his
26 motion to dismiss the FAC was filed on or about January 2, 2007. (Wolery Decl. ¶ 15.)

1 2007 Order at 4-5.) In its May 10 Order, the Court specifically referenced Plaintiff's
2 disregard of the Court's May 2, 2006 Order, as well as Rule 15 of the Federal Rules of
3 Civil Procedure. (May 10, 2007 Order at 3.) Subsequently, on or about May 14, 2007,
4 "troubled by the vague and conclusory nature of the FAC," the Court granted in part
5 and denied in part Defendants' motion to dismiss, requiring Plaintiff to file a more
6 definite statement. (May 14, 2007 Order at 11.) The Court found the FAC to be "so
7 ambiguous that the Defendants cannot reasonably be expected to frame a responsive
8 pleading," citing Plaintiff's failure to identify the emails at issue. (May 14, 2007 Order
9 12-13.)

10 On May 25, 2007, this Court granted in part and denied in part Defendants'
11 motion for sanctions and sanctioned Siegel in the amount of One Thousand Five
12 Hundred Dollars (\$1,500.00) to be paid to Defendants' for Plaintiff's failure to follow
13 the Federal Rules of Civil Procedure.⁵ (Wolery Decl. ¶ 11.) The Court reiterated its
14 award of sanctions in its Order dated June 15, 2007. (*Id.*) Such Order specifically
15 states: "[s]anctions are imposed on Plaintiff's counsel for failure to comply with the
16 Federal Rules of Civil Procedure. Plaintiff's counsel shall pay sanctions in the amount
17 of one thousand five hundred dollars (\$1,500) to Defendants' counsel." (June 15, 2007
18 Order at 1-2.) To date, Siegel has failed to pay to Defendants' counsel the sanctions
19 as ordered. (Wolery Decl. ¶ 12.)

20 Despite being sanctioned for repeated failures to abide by Court orders and the
21 Federal Rules of Civil Procedure, Plaintiff failed to file his AFAC and More Definite
22 Statement until June 22, 2007, nearly one (1) month past the time prescribed by Rule
23

24 ⁵Defendants respectfully refer the Court to Defendants' Memorandum in Support of
25 Defendants' Motion for Sanctions, filed November 8, 2006, for the factual basis of such motion and
26 the resulting Orders.

1 12(e) of the Federal Rules of Civil Procedure.⁶ (Wolery Decl. ¶ 13.) Defendants filed
2 an objection to the offending pleadings on or about June 26, 2007 and returned same
3 to Plaintiff as rejected. (Wolery Decl. ¶ 14.) During the June 28, 2007 telephonic
4 hearing, and in the Court's subsequent order dated July 9, 2007, the Court found that
5 "[t]he Plaintiff has failed to comply with [the Court's May 14, 2007] order" and gave
6 Plaintiff "one final opportunity to remedy his vague complaint." (July 9, 2007 Order at
7 2). The Court ordered Plaintiff to "file an amended pleading setting forth: a) the
8 number of emails at issue; b) the time frame during which the emails were sent' c) the
9 addresses and domain names that received the emails; and d) a brief summary of the
10 factual basis upon which Plaintiff claims that Impulse sent the emails." (*Id.* at 2-3.)
11 Plaintiff was ordered to file and serve such amended pleading "no later than July 29,
12 2007." (*Id.* at 2.) Plaintiff's 2nd AFAC, filed on July 30, 2007, fails to comply with each
13 of the requirements set forth in the Court's July 9, 2007 Order. (Wolery Decl. ¶ 16.)

14 Most recently, on or about August 23, 2007, Siegel filed a motion for leave to
15 withdraw as counsel. (Wolery Decl. ¶ 17.) The declarations in support of, and the
16 memorandum and declaration in opposition to, such motion were filed under seal.
17 (*Id.*)

18

19 **B. Summary of Violations**

20 Plaintiff's pattern of misconduct is more specifically discussed in Part II.A, *supra*.
21 The following is a summary of such misconduct noted by Defendants and this Court:

- 22 • "The Plaintiff has disregarded both an order of this Court and Rule

23
24 ⁶Pursuant to Rules 12(e) and 6(a) of the Federal Rules of Civil Procedure, Plaintiff had until
25 May 28, 2007 to amend his pleading to provide a more definite statement in accordance with the
26 Court's May 14, 2007 Order.

1 15 of the Federal Rules of Civil Procedure . . . The Plaintiff
2 amended the caption of the [First Amended Complaint] in direct
3 contravention of this Court's May 2, 2006 order. The Plaintiff
4 then filed the [Second Amended Complaint] without seeking
5 permission from the Court" in contravention of Fed. R. Civ. P. 15.
6 (May 10, 2007 Order at 3.)

- 7 • To date, Siegel has failed to pay sanctions to Defendants' counsel
8 in the amount of One Thousand Five Hundred Dollars (\$1,500.00)
9 as ordered by the Court on May 25, 2007 and again on June 15,
10 2007. (May 25, 2007 Order; June 15, 2007 Order at 1-2; Wolery
11 Decl. ¶ 12.)
- 12 • Plaintiff failed to comply with the Court's May 14, 2007 Order and
13 Fed. R. Civ. P. 12(e) by filing his purported More Definite
14 Statement nearly one (1) month late, on June 22, 2007. Wolery
15 Decl. ¶ 13.)
- 16 • "The Plaintiff has failed to comply with [the Court's May 14, 2007]
17 order" requiring Plaintiff to file a More Definite Statement by filing
18 a noncompliant pleading. (June 28, 2007 Order at 2.)
- 19 • The 2nd AFAC filed by Plaintiff on July 30, 2007, again fails to
20 comply with the requirements sent forth in the Court's July 9, 2007
21 Order.

22 As evidenced by the foregoing, Plaintiff has, in bad faith, repeatedly disobeyed
23 the Federal Rules of Civil Procedure and Orders of this Court. To date, Plaintiff has
24 failed to file a pleading that complies with the Court's June 28, 2007 Order, and has
25 failed to pay to Defendants' sanctions in the amount of One Thousand Five Hundred
26 Dollars (\$1,500.00) as ordered by the Court on May 25, 2007 and June 15, 2007.

1 (Wolery Decl. ¶ 12.) It is evident that the previous monetary sanctions have been
 2 insufficient induce Plaintiff and his counsel to comply with court orders and the
 3 Federal Rules of Civil Procedure, and that more drastic remedies are warranted. As a
 4 result, the Court must find Siegel in contempt of this Court, Plaintiff's 2nd AFAC must
 5 be dismissed with prejudice and Defendants must be awarded attorneys' fees incurred
 6 in defending this action.

8 III. LEGAL ARGUMENT

9 A. The 2nd AFAC Must Be Dismissal Under Fed. R. Civ. P. 41(b)

10 1. The Court's Inherent Power to Dismiss

11 "Parties may not wilfully, repeatedly, and persistently disobey court orders
 12 There is-and there must be- sufficient play in the joints of our system to allow a district
 13 judge to impose the ultimate sanction on such obstreperous parties." Estrada v.
 14 Cohen, 244 F.3d 1050, 1060 (9th Cir. 2001). A District Court has broad and inherent
 15 power to regulate litigation before it. Van Bronkhorst v. Safeco Corp., 529 F.2d 943
 16 (9th Cir. 1976). Where the plaintiff fails to comply with the Federal Rules of Civil
 17 Procedure or any order of court, a defendant may move for dismissal of an action.
 18 Fed. R. Civ. P. 41(b). "There is no question that a District Court has the power to
 19 dismiss a claim with prejudice for failure to comply with an order of the court." Van
 20 Bronkhorst, 529 F.2d 943, 943; O'Brien v. Sinatra, 315 F.2d 637, 637 (9th Cir. 1963)
 21 ("Both the state and federal courts have almost universally held or recognized that
 22 there is inherent power in the courts, in the interest of the orderly administration of
 23 justice, to dismiss for disobedience of court orders"). A dismissal under Fed. R. Civ. P.
 24 41(b) operates as an adjudication on the merits. Fed. R. Civ. P. 41(b).

1 2. Plaintiff's Repeated Violations

2 In the present action, Plaintiff has failed on numerous occasions to comply with
3 orders of the Court and the Federal Rules of Civil Procedure. To date: 1) Plaintiff
4 failed to comply with the Court's order denying his request to add new plaintiffs to the
5 action by surreptitiously adding the d/b/a "Gordonworks.com" as a plaintiff in his
6 FAC (Wolery Decl. ¶ 3); 2) Plaintiff failed to comply with Fed. R. Civ. P. 15 by filing
7 the SAC without leave of the Court or consent of the parties (Wolery Decl. ¶ 6); 3)
8 Plaintiff failed to comply with Fed. R. Civ. P. 12(e) by filing his purported More
9 Definite Statement nearly one (1) month late and as a separate document (Wolery
10 Decl. ¶ 13); 4) Plaintiff failed to comply with the Court's order requiring him to
11 provide a more definite statement by providing an inadequate statement that did not
12 properly address the issues raised in the Court's order (May 14, 2007 Order at; 5)
13 Plaintiff failed to comply with the Court's order to pay sanctions to Defendants in the
14 amount of One Thousand Five Hundred (\$1,500.00) (Wolery Decl. ¶ 12); and 6)
15 Plaintiff failed to comply with the Court's July 9, 2007 Order requiring him to provide
16 an amended pleading by providing an inadequate 2nd AFAC that does not properly
17 address the issues raised in the Court's order (discussed Part III.A.3., *infra*).

18 3. The 2nd AFAC Fails to Comply with the Court's Order

19 Plaintiff was given "one final opportunity to remedy his vague complaint," and
20 Plaintiff has failed. (July 9, 2007 Order at 2.) Plaintiff was ordered to file "an amended
21 pleading setting forth: a) the number of emails at issue; b) the time frame during which
22 the emails were sent; c) the addresses and domain names that received the emails; and
23 d) a brief summary of the factual basis upon which the Plaintiff claims that Impulse
24 sent the emails." (July 9, 2007 Order at 2-3.)

25 As noted by Plaintiff in his 2nd AFAC, each email allegedly sent is a separate and
26 distinct violation. (Pl.'s 2nd AFAC at 15.) For each separately identified statutory cause

1 of action, Plaintiff has failed to identify the number of emails at issue, the time frame
2 during which the emails were sent, the addresses and domain names that received the
3 emails and a summary of the factual basis upon which Plaintiff claims that Impulse
4 sent the emails. Rather, Section 4.1.1 refers to “thousands” of emails; Sections 3.7,
5 3.15, 3.16, 4.1.2, 4.2.2, 4.2.3 and 4.3.2 refer to “numerous” emails; and Section 4.1.3
6 refers to “at least one (1)” email. (Pl.’s 2nd AFAC at 11-12.) Regarding the Court’s
7 requirement that Plaintiff identify the addresses and domain names that received the
8 emails, Plaintiff simply states that Plaintiff “maintains electronic mail message accounts
9 with ‘gordonworks.com’, including under the address jim@gordonworks.com as well
10 as the domain name rcw19190020.com,” and alleges that Defendants “have initiated
11 the transmission of numerous commercial electronic mail messages directed to and
12 through Plaintiff’s interactive computer service, and/or to and through Plaintiff’s
13 domain ‘gordonworks.com’, and/or further addressed to Plaintiff Gordon’s email
14 addresses, including but not limited to jim@gordonworks.com.” (Pl.’s 2nd AFAC at 6.)
15 This language and method of pleading is identical to Plaintiff’s Original Complaint and
16 FAC, both of which the Court has already rejected as vague.

17 Plaintiff attempts to bolster his case by including irrelevant dates and purported
18 facts, and by submitting a CD-Rom containing nearly two thousand pages of emails
19 allegedly sent by Defendants. Although factual allegations set forth in the complaint
20 “taken as true and construed in the light most favorable to [p]laintiffs”, the Ninth
21 Circuit has elaborated on this rule, explaining that “courts should only accept as true
22 the well-pleaded facts, and ignore ‘legal conclusions,’ ‘unsupported conclusions,’
23 ‘unwarranted inferences,’ unwarranted deductions,’ ‘footless conclusions of law’ or
24 ‘sweeping legal conclusions cast in the form of factual allegations.” Roe v. Nev., 332
25 F. Supp. 2d 1331, 1339 (D. Nev. 2004) (emphasis added) (citing Epstein v. Wash.
26 Energy Co., 83 F.3d 1136, 1140 (9th Cir. 1996); quoting W. Mining Council v. Watt,

1 643 F.2d 618, 624 (9th Cir. 1981)). Identical to the pleadings previously rejected by
2 this Court, Plaintiff's entire 2nd AFAC consists of precisely those "facts" which courts
3 in the Ninth Circuit have suggested they should ignore— sweeping legal conclusions
4 that Defendants have violated CEMA, CPA, CAN-SPAM and/or the Prize Statute,
5 cast in the form of factual allegations. There are virtually no "well-pleaded" facts for
6 the Court to accept as true.

7 As evidenced by the foregoing, Plaintiff has failed to comply with the Court's
8 July 9, 2007 Order. Despite being given "one final opportunity," Plaintiff continues to
9 fail to identify how each or any unique email is alleged to have violated CEMA, CPA,
10 CAN-SPAM and/or the Prize Statute. As discussed in Part I *supra*, this is all part of
11 Plaintiff's scheme to avoid having to prove his case and instead to impose an
12 enormous financial burden upon Defendants.

13 4. Dismissal Under Fed. R. Civ. P. 41(b) is Appropriate

14 As a result of Plaintiff's repeated violations of Court orders and the Federal
15 Rules of Civil Procedure, Defendants have been prejudiced and forced to expend in
16 excess of one hundred thousand dollars on their legal defense. It is evident that
17 Plaintiff has no intention of abiding by court orders or the Federal Rules of Civil
18 Procedure. As in Von Poppenheim v. Portland Boxing & Wrestling Comm'n, 442
19 F.2d 1047 (9th Cir. 1971), none of the actions taken by the Court to date have
20 accomplished compliance. A District Judge need not exhaust all available sanctions
21 short of dismissal before finally dismissing a case. Von Poppenheim, 442 F.2d at 1053-
22 1054; see also McHenry v. Renne, 84 F.3d 1172, 1178 (9th Cir. 1996). Where, as in this
23 case, the record indicates that Plaintiff's continued noncompliance is not the result of
24 misunderstanding or inadvertence, but rather a result of a conscious and deliberate
25 decision, dismissal of the action is appropriate. See O'Brien, 315 F.2d 637 (9th Cir.
26 1963). In light of the foregoing, Plaintiff's 2nd AFAC should be dismissed, in its

entirety, with prejudice.

B. The 2nd AFAC Must Be Dismissed Under Fed. R. Civ. P. 12(b)(1)(2) & (6)

Plaintiff's 2nd AFAC is nearly identical to his FAC, except for Sections 4.3.3, 4.3.4 and 4.3.5 relating to damages under the Prize Statute. As a result, Defendants renew their prior motion to dismiss under Fed. R. Civ. P. 12(b)(1), (2) and (6), and respectfully refer the Court to Defendants' previous briefings⁷ in support of the prior motions to dismiss the FAC on these grounds.

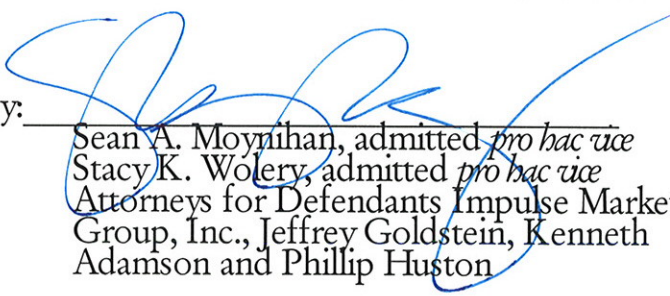
IV. CONCLUSION

In light of the foregoing arguments, Plaintiff's Second Amended First Amended Complaint should be dismissed, in its entirety, with prejudice. Defendants respectfully requests that the Court: 1) dismiss Plaintiff's Second Amended First Amended Complaint, in its entirety, with prejudice; and 2) award Defendants their costs and fees incurred in this action.

RESPECTFULLY SUBMITTED, this 20^m day of September, 2007.

KLEIN ZELMAN ROTHERMEL LLP

By: _____


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⁷(Impulse, Goldstein and Adamson Mot. to Dismiss the 1st Am. Compl., dated Aug. 31, 2007); (Huston Mot. to Dismiss the 1st Am. Compl., dated Jan. 2, 2007).

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LIEBLER, CONNOR, IVEY, BERRY
& ST. HILAIRE

By: Floyd E Ivey
Floyd E Ivey
Local Counsel for Defendants Impulse
Marketing Group, Inc., Jeffrey Goldstein,
Kenneth Adamson and Phillip Huston

CERTIFICATE OF SERVICE

I, hereby, certify that on September 20, 2007, I electronically filed this pleading with this Court. The Clerk of the Court will provide electronic notification using the CM/ECF system, which will send an electronic copy of the Memorandum in Support of Defendants' Motion to Dismiss the Second Amended First Amended Complaint: Robert J. Siegel, Floyd E. Ivey and Sean A. Moynihan. I hereby certify that I have served the forgoing to the following non-CM/ECF participants by other means:

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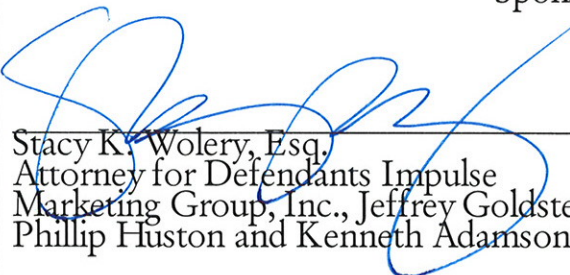
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